No. 80-1189

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES H. BUMPUS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners seek review of the decision below enforcing internal revenue summonses on the ground that the district court failed to make de novo findings of fact after the case was heard by a magistrate.

In these consolidated internal revenue summons enforcement cases, the district court initially referred the government's petitions for enforcement of the summonses to a United States magistrate in the United States District Court for the District of Alaska. Petitioners contended, *inter alia*, that the agent's investigations were solely criminal and, accordingly, the summonses were improper. After a hearing held by the magistrate at which the issuing agent testified, the magistrate made recommended findings of fact that the summonses were issued for the purposes of securing "information relevant to the * * * inquiry into the civil

tax liability of" petitioner Bumpus (Pet. App. x); that the investigating agent had made no recommendation for prosecution to his supervisor, nor had a recommendation of prosecution been sent by the Internal Revenue Service to the Department of Justice (*ibid.*); and that the Internal Revenue Service had "not abandoned its inquiry into the civil tax liability of" petitioner Bumpus (Pet. App. xii). Petitioners objected to the findings that the agent had a civil purpose (Pet. App. xviii) and that the Internal Revenue Service had not abandoned an inquiry into the tax liability of petitioner Bumpus (Pet. App. xx). They did not dispute the finding that there had been no recommendations for prosecution. While petitioners stated these objections to the district court, they failed to order a transcript or present a tape recording of the proceedings before the magistrate for review by the district court (Pet. App. xxxviii). After considering the record before it and the magistrate's report, the district court ordered the summons enforced (Pet. App. xxviii-xxxiv).

The court of appeals affirmed (Pet. App. xxxv-xxxviii). It rejected petitioners' argument that the district court failed to make a de novo determination of the magistrate's findings, as required by 28 U.S.C. 636(b). As the court noted, petitioners failed to allege "specific facts that would tend to support their burden of showing that the summonses were issued in bad faith" (Pet. App. xxxviii). The court further observed that petitioners conceded that they failed to order a transcript or present a tape recording of the magistrate's proceedings and that in a subsequent enforcement proceeding the district court had reviewed the entire record of the proceedings before the magistrate. "[I]n the[se] unique procedural circumstances * * * , [the court of appeals concluded that] it would be an idle act now to reverse the district court's orders" (*ibid.*).

1. The decision below correctly enforced the summonses at issue. It is well established that the burden of establishing the abandonment of a civil purpose, as a defense to the enforcement of a summons, rests on the person resisting enforcement. See *United States* v. *LaSalle National Bank*, 437 U.S. 298, 316 (1978). The person resisting enforcement, therefore, is required to at least allege specific facts, which, if proved, would establish that enforcement of the summons would be improper. See *United States* v. *Garden State National Bank*, 607 F. 2d 61, 69-70 (3d Cir. 1979). But here, as the court of appeals noted (Pet. App. xxxviii), petitioners failed to allege any such facts, and they do not appear to contend otherwise.[1] Thus, whether or not the district court erred in not making a de novo determination of the magistrate's recommended findings, petitioners still could not defeat the enforcement of these summonses. Accordingly, the court of appeals correctly held that any possible irregularity in the district court's review of the magistrate's recommendations would not be grounds for reversal of the order enforcing the summonses.

2. At all events, it is not clear that the district court failed to satisfy the de novo review requirements of Section 636(b). While contesting the magistrate's recommended findings, petitioners failed to supply the district court with a transcript or recording of the proceedings before the magistrate. Both the district court and the court of appeals, therefore, could properly assume that petitioners were not contesting the facts developed at the hearing, but rather the legal conclusions of the magistrate based on these facts. In these circumstances, the district court could hardly be

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[1] Petitioners contend that "[t]hey alleged that there was no civil purpose for the tax investigation" (Pet. 6). Such a conclusory allegation is easily made but falls short of the requirement that they allege specific facts demonstrating the lack of a civil purpose. *United States* v. *Church of Scientology of California*, 520 F. 2d 818, 824 (9th Cir. 1975).

faulted for failing to review a transcript that was not put before it. See *United States* v. *Raddatz*, No. 79-8 (June 23, 1980), slip op. 15. Compare *United States* v. *Miller*, 609 F. 2d 336, 340 (8th Cir. 1979); *United States* v. *Southern Tanks, Inc.*, 619 F. 2d 54, 56 (10th Cir. 1980).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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